

SERVICE DATE – MARCH 10, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34776

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL. –
PETITION FOR DECLARATORY ORDER

Decided: March 8, 2006

National Solid Wastes Management Association (NSWMA)¹ has filed a petition for a declaratory order seeking a determination that certain solid waste operations undertaken on property owned by the New York, Susquehanna and Western Railway Corporation (NYS&W) in North Bergen, NJ,² are neither rail transportation nor integrally related to rail transportation and, therefore, are not within the Board's exclusive jurisdiction. Petitioners have also requested that the Board's decision extend to other similarly situated solid waste operations. The New Jersey Department of Environmental Protection and New Jersey Meadowlands Commission (NJDEP), Rail-Tech, NYS&W, and Progressive Rail, Incorporated, have opposed the petition. For the reasons set forth below, we will not institute a declaratory order proceeding.

BACKGROUND

On October 27, 2005, petitioners filed their request for a declaratory order. Several parties filed replies supporting NSWMA's petition,³ and others, although taking no position,

¹ NSWMA is joined in this petition by the following parties: New Jersey State League of Municipalities; Village of Ridgefield Park, NJ; Burlington County, NJ; Solid Waste Association of North America; Construction Materials Recycling Assn.; City of Newark, NJ; Hainesport Township, NJ; The U.S. Conference of Mayors; and Integrated Waste Services Association. Collectively, these parties will be referred to as the petitioners.

² According to NSWMA's petition, Rail-Tech, L.L.C. (Rail-Tech) operates a solid waste facility at a site located at 16th Street and Secaucus Road in North Bergen (the site or North Bergen facility), which is adjacent to a line of railroad owned by NYS&W.

³ New York State Department of Environmental Conservation; Cape May County Municipal Utilities Authority; Pollution Control Financing Authority of Camden County, NJ; and Bridgewater Resources, Inc.

requested an opportunity to share their views if the Board institutes a proceeding.⁴ United States Congressman (now Senator) Robert Menendez of New Jersey wrote to the Board in support of NSWMA's petition. NJDEP, Rail-Tech, NYS&W, and Progressive Rail, Incorporated, filed replies to the petition urging the Board not to institute a proceeding.

The record at that time indicated that the North Bergen facility had been closed permanently, and that essentially the same site-specific federal preemption issues petitioners raised here are also the subject of ongoing litigation in the United States District Court for the District of New Jersey (the district court).⁵ In view of the status of the site and the pending district court case, the Board, by the Director of the Office of Proceedings, issued a decision on November 23, 2005 (November 23 Decision), soliciting further public input on whether the Board should institute a proceeding.

In response to the Board's November 23 Decision, the following parties submitted comments and/or reply comments: Metro Waste Authority, Onondaga County Resource Recovery Agency, New York City Department of Sanitation, New England Transrail, LLC (NET), Commonwealth of Massachusetts Representative James R. Miceli, Hudson County Improvement Authority and Hudson County Solid Waste Management District, Boston Mountain Solid Waste District, NSWMA,⁶ and NYS&W.⁷

POSITIONS OF THE PARTIES

In responding to the November 23 Decision, six of the commenters focus entirely upon the merits of petitioners' request, asserting that activities at the site do not constitute, and are not integrally related to, rail transportation. The other three commenters – NSWMA, NYS&W, and NET – specifically address the concerns raised in the November 23 Decision.

⁴ American Short Line and Regional Railroad Association; John D. Fitzgerald, United Transportation Union – General Committee of Adjustment; and Commonwealth of Massachusetts, Office of the Attorney General and Department of Environmental Protection.

⁵ The New York, Susquehanna, and Western Railway Corp. v. Campbell, Civil Action No. 05-4010 (D.N.J.). The district court also recently addressed federal preemption in J.P. Rail, Inc. v. New Jersey Pinelands Comm'n, No. 05-2755, 2005 U.S. Dist. LEXIS 36411 (D.N.J. Dec. 22, 2005).

⁶ NSWMA styled its responsive filing of December 21, 2005, as a "Response to NYS&W's Opposition to the Petition for Declaratory Order," suggesting that its filing was directed, at least in part, to NYS&W's original November 14, 2005 reply to the petition.

⁷ NYS&W filed a reply on December 23, 2005, addressing the comments filed in response to the Board's November 23 Decision. On December 30, 2005, NYS&W filed a motion for leave to respond to NSWMA's December 21 comments, along with its response. NYS&W's motion will be granted and its December 30 reply comments will be accepted in the interest of a fully developed record.

NSWMA maintains that the Board should institute a declaratory order proceeding despite the closure of the facility and the ongoing district court litigation. Specifically, NSWMA argues that a proceeding is warranted because the circumstances here are capable of repetition in other cases. NSWMA claims that, if the Board fails to act, NYS&W and other solid waste operators will open similar facilities, only to close them – and thereby “manufacture mootness” as part of a continual cat-and-mouse game – when the legal status of such facilities is challenged before the Board. NSWMA also argues that, even with the closing of the North Bergen facility, the Board should issue a declaratory order on the preemption issue here in order to provide guidance for challenges to activities at solid waste facilities in the future.

NSWMA asserts that, despite the pending district court litigation, it would still be appropriate to institute a declaratory order proceeding, citing CSX Transportation, Inc. – Petition for Declaratory Order, STB Finance Docket No. 34662 (STB served Mar. 14, 2005) (CSX Transportation), reconsideration denied (STB served May 3, 2005)⁸ (in which the federal court and the Board considered federal preemption issues concurrently), and Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001)⁹ (Town of Ayer) (in which case the federal preemption issue was referred to the Board by the United States District Court for the District of Massachusetts). NSWMA also argues that Green Mountain Railroad Corporation – Petition for Declaratory Order, STB Finance Docket No. 34052 (STB served May 28, 2002) (Green Mountain), upon which the parties opposing the petition have relied, is distinguishable because, in Green Mountain, unlike here, at least one of the parties specifically sought referral to the Board (which was denied), and the federal court had already ruled on the preemption issue when it declined to refer the matter.

NYS&W, on the other hand, urges us to deny the petition.¹⁰ NYS&W disputes NSWMA’s allegation that the Rail-Tech facility’s closure stemmed from NSWMA’s declaratory order request, stating that the railroad decided to close the site before NSWMA filed its petition. NYS&W adds that the site has been closed permanently, countering NSWMA’s suggestion that NYS&W is engaging in cat-and-mouse tactics. NYS&W argues that, without an active facility, the petition is moot and a declaratory order would therefore resolve no live case or controversy.

NYS&W also distinguishes CSX Transportation and Town of Ayer, observing that, in the former case, the federal district court specifically expressed an interest in obtaining the Board’s views, and, in the latter, the federal court actively sought the Board’s input. NYS&W notes that,

⁸ Pets. for judicial review pending, District of Columbia v. STB, Nos. 05-1220 et al. (D.C. Cir. filed June 22, 2005).

⁹ Aff’d, Boston & Maine Corp. v. Town of Ayer, 206 F.Supp. 2d 128 (D. Mass. 2002), rev’d solely on attys’ fee issue, 330 F.3d 12 (1st Cir. 2003).

¹⁰ NET comments that the petition appears designed to circumvent the ongoing district court proceeding.

here, in contrast, the district court has neither referred the matter to the Board nor expressed any interest in obtaining the Board's views. NYS&W argues that the Board should take the same approach it took in Green Mountain and decline to institute a declaratory order proceeding because the court can itself address any remaining issues, based on the extensive body of court and agency precedent addressing the reach of federal preemption under 49 U.S.C. 10501(b).

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority – Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). We will not grant the petition, and no proceeding will be instituted.

There is no active case or controversy for the Board to resolve. The North Bergen facility is closed, NYS&W states that it will not be reopened, and petitioners have not pointed to an alternative site that would warrant continuing with this proceeding. Consequently, petitioners' request here – to declare that previous activities at the site do not constitute rail transportation and are not integrally related to rail transportation – is moot.

Furthermore, NYS&W and NJDEP are involved in ongoing litigation before the district court concerning fines imposed by the State of New Jersey against NYS&W for past operations at the site. The district court litigation encompasses NYS&W's challenge to the state's enforcement action and efforts to regulate activities at the site, and an extensive record has evidently been compiled in that court. Specifically, NYS&W asserts in the district court that its on-site activities were part of rail transportation, and that state regulation is therefore preempted by federal law. NJDEP contends that NYS&W's activities at the site constituted waste processing, not rail transportation, and that there is no federal preemption for NYS&W's activities under section 10501(b). Accordingly, NJDEP further contends that all state regulations that apply to solid waste processing facilities applied to the North Bergen facility. Moreover, both NJDEP and NYS&W have indicated that the court can properly address the federal preemption issues presented by the North Bergen facility without Board input.

As noted above, the Board's authority to institute a declaratory order proceeding is entirely discretionary. Accordingly, although Board precedent may be of guidance, past cases would neither mandate granting the petition nor obligate us to deny it. Nevertheless, we note that this proceeding is analogous to Green Mountain, where the Board chose not to institute a declaratory order proceeding in light of concurrent court litigation which had been initiated the day after one of the parties to that litigation filed its petition with the Board. There, as here, the court decided not to refer the federal preemption question to the Board, even though it was aware of the option. Our decision here is therefore consistent with Green Mountain.

The Board and the courts already have developed a considerable body of law addressing the reach of federal preemption under section 10501(b), in cases involving facilities, which the

district court can apply in this case.¹¹ Moreover, the issues presented by the petition, although based on specific facts and circumstances, are neither unique nor unlikely to reappear before this agency. We fully anticipate other opportunities to address, and are prepared to address, such issues when they emerge in other cases.

For all of these reasons, this request to institute a declaratory order proceeding will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to institute a declaratory order proceeding is denied.
2. NYS&W's motion for leave to file a response to NSWMA's December 21, 2005 reply is granted and NYS&W's response is accepted.
3. This decision is effective on the date of service.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary

¹¹ See, e.g., Green Mountain R.R. v. State of Vermont, 404 F.3d 638 (2d Cir. 2005); Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295 (3d Cir. 2004) (Hi Tech v. New Jersey); Florida East Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324 (11th Cir. 2001); Grafton and Upton R.R. v. Town of Milford, Civ. No. 03-40291 (D. Mass. Feb. 14, 2006); Canadian National Ry. v. City of Rockwood, No. 04-40323, 2005 WL1349077 (E.D. Mich. 2005); Norfolk S. Ry. v. City of Austell, No. 1:97-CV-108-RLV, 1997 WL 1113647 (N.D. Ga. 1997); Town of Milford, MA – Pet. for Decl. Order, STB Finance Docket No. 34444 (STB served Aug. 12, 2004); Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, NJ, STB Finance Docket No. 34192 (STB served Dec. 20, 2002); and Town of Ayer. See also, CSX Transportation (providing a recent and thorough summary of the many relevant court opinions and Board decisions addressing section 10501(b)).